Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
BellSouth Emergency Petition for	)	
Declaratory Ruling and Preemption of	)	WC Docket No. 04-245
State Action	)	
	)	

COMMENTS OF VERIZON

Michael E. Glover
Edward Shakin
Julie Chen Clocker
VERIZON
1515 North Courthouse Road
Suite 500
Arlington, VA 22201-2909
(703) 351-3071

Scott H. Angstreich
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, DC 20036
(202) 326-7900

Counsel for Verizon

July 30, 2004

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
BellSouth Emergency Petition for	)	
Declaratory Ruling and Preemption of	)	WC Docket No. 04-245
State Action	)	
	)	

COMMENTS OF VERIZON[1]

INTRODUCTION

The Commission should confirm what is explicit in the text and structure of the Telecommunications Act of 1996 ("1996 Act") — the obligation to provide access to network elements under section 271 ("271 elements") is a *federal* obligation, subject to *federal* regulation, and state commissions, therefore, have no authority under federal law to regulate 271 elements. In addition, the Commission should confirm that state commissions likewise have no authority under state law to regulate 271 elements, and that any purported sources of such authority are preempted.

The decision of the Tennessee Regulatory Authority ("TRA") that forms the basis for BellSouth's petition is no isolated incident. Instead, it is part of a systematic and nationwide effort by CLECs to reimpose the discredited regime of maximum unbundling by relying on section 271 to override the Commission's no impairment findings in the *Triennial Review Order* — with respect to *both* broadband and narrowband elements — and the D.C. Circuit's decision in *USTA II*. AT&T, for example, has argued that section 271 provides state commissions with

[1] The Verizon Telephone Companies ("Verizon") are identified in Appendix A to these comments.

"authority to require unbundling 'at cost-based prices.'"[2] And Covad claims that state commissions should "require Verizon to continue to offer line sharing pursuant to section 271 at existing UNE rates, terms, and conditions."[3] At the recent NARUC conference, CLECs urged state commissions to "[i]mplement loop, switching and transport requirements for the section 271 'checklist' through section 252 agreements and SGATs" and to "[a]rbitrate Bell company wholesale rates under section 252 and state law."[4] Nor is the TRA the only state commission to accept these arguments. In recent decisions, the Pennsylvania commission relied on section 271 in ordering Verizon to continue providing circuit switching for enterprise customers and line sharing at TELRIC rates.[5]

But as the Commission has rightly recognized, section 271 cannot be used to effect an end-run around Section 251, and to "gratuitously reimpose" "a virtually unlimited standard [for] unbundling, based on little more than faith that more unbundling is better." *Triennial Review*

---

[2] Response of AT&T Communications of Washington, D.C., LLC and Teleport Communications-Washington, D.C., LLC to the Petition for Reconsideration Filed by Verizon Washington DC Inc., *In re the Effect of the USTA II Decision on the Local Telecommunications Marketplace in the District of Columbia*, Formal Case No. 1029, at 15 n.21 (D.C. PSC filed June 24, 2004).

[3] Comments of Covad Communications Company, *The Effect of the USTA II Decision on the Local Telecommunications Marketplace in the District of Columbia*, Formal Case No. 1029, at 13 (D.C. PSC filed July 6, 2004).

[4] Ex Parte letter from Dolores A. May, Verizon, to Marlene H. Dortch, FCC, CC Docket Nos. 01-338 *et al.*, Attachment at 5 (FCC filed July 27, 2004).

[5] *See* Reconsideration Order, *Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market*, Docket No. I-00030100, at 12, 17 (Pa. PUC May 27, 2004); *see also* Interlocutory Order, *Covad Communications Company v. Verizon Pennsylvania, Inc.*, Dkt. No. R-00038871C0001, at 16, 20 (Pa. PUC July 8, 2004). A Hearing Examiner in Maine recently recommended that the Maine commission hold that Verizon must continue to charge "current TELRIC rates" for 271 elements until this Commission affirmatively approves new rates and Verizon then "file[s] th[os]e rates [in Maine] pursuant to [its] usual tariffing process" under state law. Examiner's Report, *Verizon Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682, at 22-23 (Me. PUC July 23, 2004).

Order[6] ¶¶ 658-659. Instead, section 271 reflects Congress's determination of the appropriate requirements to impose on Bell Operating Companies ("BOCs") as a condition for authorizing them to provide in-region, long-distance service. Congress then assigned to the Commission, and the Commission alone, the task of ensuring that BOCs comply with those requirements. Congress's and the Commission's determinations of which network elements must — and need not — be provided as 271 elements, as well as the federal standard used to assess the rates, terms, and conditions that BOCs establish for those 271 elements, preempt any contrary state commission determinations.

In addition to these issues, state regulation of 271 elements would interfere with the establishment of market rates for 271 elements, such as through negotiation of "arms-length agreements" that the Commission has recognized are one method of establishing rates, terms, and conditions for 271 elements. *Id.* ¶ 664. Indeed, state-by-state regulation of 271 elements would frustrate Congress's goal of establishing a national framework to promote local competition while permitting BOCs to compete in the long-distance market.[7]

---

[6] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *vacated in part and remanded*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *petitions for cert. pending*, Nos. 04-12, 04-15 & 04-18 (U.S. filed June 30, 2004).

[7] On July 14, 2004, ITC^DeltaCom filed a letter in which it claimed that the Commission lacks jurisdiction to rule on BellSouth's Petition because the TRA issued its decision in the context of an interconnection agreement arbitration. *See* Letter from Henry Walker, Counsel for ITC^DeltaCom, to Marlene H. Dortch, FCC, WC Docket No. 04-245 (FCC filed July 14, 2004). But the Commission unquestionably has jurisdiction to issue a declaratory ruling that the TRA's action is unlawful, which BellSouth could then seek to enforce through a federal court action brought pursuant to section 252(e)(6). *See City of Chicago v. FCC*, 199 F.3d 424, 429 (7th Cir. 1999) ("The FCC has authority to issue declaratory rulings.") (citing 5 U.S.C. § 554(e)); *see also AT&T Corp. v. FCC*, 349 F.3d 692 (D.C. Cir. 2003) (reviewing declaratory ruling issued in response to primary jurisdiction referral from district court, which would then apply the Commission's determination).

DISCUSSION

I. THE 1996 ACT CONFERS NO FEDERAL LAW AUTHORITY ON STATE COMMISSIONS TO REGULATE 271 ELEMENTS

1. Section 271 requires BOCs, such as Verizon, to demonstrate that they provide access to certain network elements — "loop[s]," "transport," "switching," and "databases and associated signaling" — in order to obtain authority to provide in-region long-distance services. 47 U.S.C. § 271(c)(2)(B)(iv)-(vi), (x). The Commissions also has construed section 271 to impose an independent and continuing obligation on BOCs to provide access to these elements, even when they do not have to be unbundled under the standard set forth in section 251(d)(2). This obligation imposed by section 271, however, is entirely one of federal law and is within the exclusive jurisdiction of the Commission to interpret and enforce. Indeed, as the Commission and courts have recognized, "Congress has clearly charged the FCC, and not the State commissions," with determining whether a BOC has complied with conditions in section 271. *SBC Communications Inc. v. FCC*, 138 F.3d 410, 416-17 (D.C. Cir. 1998); *see Michigan 271 Order*[8] ¶ 30 ("We emphasize, however, that it is our role to determine whether the factual record supports a conclusion that particular requirements of section 271 have been met."); *InterLATA Boundary Order*[9] ¶ 18 (recognizing "the exclusive authority that Congress intended that the Commission exercise over the section 271 process").

The terms of section 271 make this conferral of authority on the Commission explicit. Thus, "*the Commission shall* . . . approv[e] or deny[]" an application for long-distance authority;

[8] Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, 12 FCC Rcd 20543 (1997) ("*Michigan 271 Order*").

[9] Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration Or Clarification of Declaratory Ruling Regarding U S West Petitions To Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392 (1999) ("*InterLATA Boundary Order*").

"*[t]he Commission shall* establish procedures for the review of complaints" that a BOC is not complying with section 271; "*the Commission shall* act on such [a] complaint within 90 days"; and "*the Commission may*" take action to enforce the requirements of section 271 if "*the Commission determines*" that a BOC is not complying with that section. 47 U.S.C. § 271(d)(3), (6) (emphases added). And Congress again spoke to the Commission's authority to implement section 271 when it precluded "*[t]he Commission*" from acting, "by rule or otherwise, [to] limit or extend" the conditions set forth in the "competitive checklist." *Id.* § 271(d)(4) (emphasis added).

In contrast to these explicit delegations of authority to the Commission to implement section 271, Congress expressly limited state commissions' role under section 271 to one of "consult[ation]" on whether an "application" for authority to offer in-region long-distance service complies with the requirements of section 271(c). *Id.* § 271(d)(2)(B). Even in the context of such an application, "the statute does not require the FCC to give State Commissions' views any particular weight." *SBC*, 138 F.3d at 416; *see Michigan 271 Order* ¶ 30 ("the Act does not prescribe any standard for Commission consideration of a state commission's verification under section 271(d)(2)(B)" and the Commission "has discretion in each section 271 proceeding to determine what deference the Commission should accord to the state commission's" views). Congress, moreover, did not provide any role for state commissions *after* approval of an application for long-distance authority. Instead, as the Commission has recognized, "Section 271(d)(6) provides specific tools that augment *our* preexisting enforcement authority." *New York 271 Order*[10] ¶ 16 (emphasis added). Indeed, in the cases brought to date

[10] Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA*

under section 271(d)(6), the Commission has not found that it has the obligation to consult with the state commission before ruling on the complaint.

2. Other provisions of the 1996 Act confirm that Congress delegated no authority over 271 elements to state commissions. First, although state commissions have authority to approve interconnection agreements and to arbitrate disputes that arise in carriers' negotiation of those agreements, that authority does not extend to obligations imposed on BOCs under section 271. As the 1996 Act makes clear, the statutory trigger for the exercise of state commission authority over interconnection agreements is "a request for interconnection, services, or network elements *pursuant to section 251*." 47 U.S.C. § 252(a)(1) (emphasis added). Interpreting this provision, the Commission has held that "only those agreements that contain an ongoing obligation *relating to section 251(b) or (c)*" are "interconnection agreement[s] . . . pursuant to section 252(a)(1)."[11]

If the parties cannot reach agreement in response to such a "request for negotiation *under this section*," either party "may petition a State commission to arbitrate any open issues." 47 U.S.C. § 252(b)(1) (emphasis added). Section 251(c)(1) confirms that incumbents' obligation to negotiate and, if necessary, arbitrate — pursuant to the processes set forth in section 252 — is limited to "terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of []section [251](b) and [(c)]." *Id.* § 251(c)(1). Relying on these provisions, courts have made clear that state commissions have no authority to compel parties to arbitrate issues unrelated to section 251. *See MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 298 F.3d

---

Service in the State of New York, 15 FCC Rcd 3953 (1999) ("*New York 271 Order*"), *aff'd, AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

[11] Memorandum Opinion and Order, *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty To File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, 17 FCC Rcd 19337, ¶ 8 & n.26 (2002) ("*Qwest Declaratory Ruling*") (emphasis added).

1269, 1274 (11th Cir. 2002) ("scheme and the text" of the 1996 Act establishes "only a limited number of issues on which incumbents are mandated to negotiate"). Finally, in resolving any open issues in such an arbitration, the state commission must "ensure that [its] resolution . . . meet[s] the requirements *of section 251*." 47 U.S.C. § 252(c)(1) (emphasis added); *see also id.* § 252(e)(2)(B) (state commission may reject arbitrated agreement if "the agreement does not meet the requirements *of section 251*") (emphasis added).

As the Commission has held, and the D.C. Circuit affirmed, the requirement that BOCs provide access to 271 elements is an "independent obligation" that exists "regardless of any unbundling analysis under section 251." *Triennial Review Order* ¶ 653; *see id.* ¶ 655 ("section 251 and 271 . . . operat[e] independently"); *USTA II*, 359 F.3d at 588 ("The FCC reasonably concluded that checklist items four, five, six and ten imposed unbundling requirements for those elements independent of the unbundling requirements imposed by §§ 251-252."). Therefore, while state commissions' authority to arbitrate interconnection agreements applies to UNEs, under section 251, it does not extend to 271 elements.

Second, Congress limited state commissions' authority to set rates to only those network elements as to which the Commission has found impairment and required incumbents to provide as UNEs under section 251. Section 252(d)(1) authorizes state commissions to make "[d]eterminations . . . [of] the just and reasonable rate for network elements" only "for purposes of []section [251](c)(3)." 47 U.S.C. § 252(d)(1); *see also id.* § 252(c)(2) (authorizing state commission to "establish any rates for . . . network elements according to []section [252](d)"). Section 251(c)(3), in turn, obligates incumbents to "provide . . . nondiscriminatory access to network elements on an unbundled basis" only when "the Commission" "determin[es]" that carriers would be "impair[ed]" without access to such elements as UNEs. *Id.* §§ 251(c)(3),

(d)(2). And the Commission has held, and the D.C. Circuit affirmed, that the pricing standard in section 252(d)(1) — and, therefore, state commissions' pricing authority — is "quite specific" and "only applies for the purposes of implementation of section 251(c)(3)." *Triennial Review Order* ¶ 657; *see id.* ¶ 656 ("Where there is no impairment under section 251 . . . . section 271 requires [certain] elements to be unbundled, but not using the statutorily mandated rate under section 252."); *USTA II*, 359 F.3d at 589 ("we see nothing unreasonable in the Commission's decision to confine TELRIC pricing to instances where it has found impairment"). Indeed, the D.C. Circuit found that "the CLECs *have no serious argument*" that "the § 251 pricing rules apply to unbundling pursuant to § 271." *Id.* at 589 (emphasis added). State commissions' authority under the 1996 Act to set rates is thus limited to UNEs, and does not extend to 271 elements.[12]

For these reasons, the 1996 Act grants no authority to state commissions to regulate 271 elements, and a state commission, like the TRA, that purports to do so pursuant to federal law authority is acting contrary to federal law. Instead, as the D.C. Circuit held with respect to Congress's delegation to in § 251(d)(2) to "'the Commission' to 'determine[ ]' which network elements shall be made available to CLECs on an unbundled basis," the authority to regulate 271 elements is delegated exclusively to the Commission. *Id.* at 565. Moreover, it is equally "clear here that Congress has not delegated to the FCC the authority to subdelegate to outside parties,"

[12] In the *Triennial Review Order*, the Commission rejected arguments that sections 251(d)(3) and 252(e)(3) preserve state commissions' state law authority to require incumbents to provide UNEs for network elements as to which the Commission found no impairment or otherwise declined to require unbundling under § 251(c)(3) and 251(d)(2). *See Triennial Review Order* ¶ 194. Those sections have no applicability in the context of 271 elements. Indeed, section 251(d)(3) applies only to Commission actions "prescribing and enforcing regulations to implement the requirements of [section 251]." 47 U.S.C. § 251(d)(3). Similarly, section 252(e)(3) provides only "that nothing *in section 252* prohibits a state commission from imposing additional requirements of state law in its review of an interconnection agreement." *Triennial Review Order* ¶ 194.

so the Commission cannot authorize state commissions to exercise its federal law authority. *Id.* at 566. In this regard, "the fact that other provisions of the statute carefully delineate a particular," and limited, "role for the state commissions" in the 271 process provides further confirmation that a finding that state commissions have no federal law authority over 271 elements "is consistent with congressional intent." *Id.* at 568.

II. THE 1996 ACT AND THE COMMISSION'S DECISIONS PREEMPT STATE REGULATION OF 271 ELEMENTS UNDER STATE LAW

In enacting the 1996 Act, "Congress entered what was primarily a state system of regulation of local telephone service and created a comprehensive federal scheme of telecommunications regulation administered by the Federal Communications Commission." *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 359 F.3d 493, 494 (7th Cir. 2004). As the Supreme Court has held, Congress "unquestionably" took "regulation of local telecommunications competition away from the States" on all "matters addressed by the 1996 Act." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999). Section 271, moreover, "establish[es] a comprehensive framework governing Bell operating company (BOC) provision of 'interLATA service'" and, as shown above, provides only an extremely limited role for state commission participation within that framework. *E.g.*, Memorandum Opinion and Order, *Petition of SBC Communications for Forbearance*, 19 FCC Rcd 5211, ¶ 7 (2004). In addition, section 271 "is the direct progeny of the Modification of Final Judgment (MFJ)," *Triennial Review Order* ¶ 655 n.1986, and "the states had no jurisdiction" over the implementation of the MFJ, *InterLATA Boundary Order* ¶ 16. And the Commission has already ruled that it is *federal* law — namely, sections 201 and 202 — that establishes the standard that BOCs must meet in

offering access to 271 elements. *See Triennial Review Order* ¶ 656; *UNE Remand Order*[13] ¶ 470; *USTA II*, 359 F.3d at 588-90.

State commissions, therefore, cannot assert state law authority to regulate 271 elements, which "are a purely federal construct." *InterLATA Boundary Order* ¶ 18. In particular, state commissions cannot — as CLECs are urging — rely on state law to expand the list of 271 elements or to regulate the rates, terms, and conditions on which BOCs provide access to those elements.

1. The Commission has held that, in section 271, Congress identified a limited set of specific network elements to which BOCs must provide access irrespective of whether their competitors would be impaired without access to those elements as UNEs. *See Triennial Review Order* ¶ 653. Congress also expressly prohibited the Commission from "extend[ing] the terms used in the competitive checklist" to include additional network elements. 47 U.S.C. § 271(d)(4); *see also* 47 U.S.C. § 160(a), (d) (permitting the Commission to eliminate the obligation to provide 271 elements once "it determines that th[e] requirements [of section 271] have been fully implemented"). It necessarily follows that any decision by a state commission purporting to create new 271 elements under state law authority conflicts with Congress's determination and, therefore, is preempted. *See, e.g.*, *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 353 (2001); *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987).

This is especially true with respect to those network elements as to which the Commission has found no impairment and that Congress did not require BOCs to provide as 271

[13] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), *petitions for review granted, United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

elements. Section 271 "does not gratuitously reimpose the very same requirements that" section 251 "has eliminated." *Triennial Review Order* ¶ 659. Nor does it permit a return to "virtually unlimited . . . unbundling, based on little more than faith that more unbundling is better." *Id.* ¶ 658. Therefore, once the Commission has concluded that such elements need not be provided as UNEs, state commissions (or, for that matter, the Commission, *see* 47 U.S.C. § 271(d)(4)) have no authority to require BOCs to provide unbundled access to those elements.

2. State commission efforts to regulate the rates, terms, and conditions for 271 elements are also preempted. As an initial matter, and notwithstanding CLECs' claims to the contrary, there can be no serious dispute that state commissions are precluded from requiring BOCs to provide access to 271 elements at TELRIC, or substantially equivalent, rates. The Commission has already determined that "TELRIC pricing for checklist network elements that have been removed from the list of section 251 UNEs is neither mandated by the statute *nor necessary to protect the public interest*." *Triennial Review Order* ¶ 656 (emphasis added). The Commission's conclusion is consistent with its earlier recognition that, where the Commission has found "that a competitor is not impaired in its ability to offer services without access to [an] element," "it would be *counterproductive* to mandate that the incumbent offers the element at forward-looking prices." *UNE Remand Order* ¶ 473 (emphasis added).

Any state law purporting to permit a state commission to require forward-looking rates for 271 elements — whether TELRIC rates or otherwise — is therefore preempted. Under the Supremacy Clause, "[t]he statutorily authorized regulations of [a federal] agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof."[14]

[14] *City of New York v. FCC*, 486 U.S. 57, 64 (1988); *see Geier v. American Honda Motor Co.*, 529 U.S. 861, 872, 881 (2000) (states may not depart from "deliberately imposed" federal standards); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155 (1982) (federal

The Commission's conclusion that TELRIC pricing does not — and should not — apply to 271 elements constitutes "a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute" and thus preempts inconsistent state regulation.[15] State law, therefore, can provide no "back door" for the reimposition of TELRIC rates for network elements that the Commission has determined BOCs should not be required to make available at forward-looking prices. There is no plausible basis on which state commissions could justify "inflict[ing] on the economy the sort of costs" associated with forced sharing at TELRIC rates where a no impairment finding makes it indisputable that there is "no reason to think doing so would bring on a significant enhancement of competition." *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002).

More generally, state laws purporting to permit state regulation of 271 elements are preempted because they are inconsistent with the Commission's determination (affirmed by the D.C. Circuit) that sections 201 and 202 establish the standard for assessing the rates, terms, and conditions on which BOCs provide access to 271 elements. *See Triennial Review Order* ¶ 656; *UNE Remand Order* ¶ 470; *USTA II*, 359 F.3d at 588-90. As the Commission has explained, this means that, for 271 elements, "the market price should prevail." *UNE Remand Order* ¶ 473. Thus, a BOC satisfies that federal law standard when it offers 271 elements at market rates, terms, and conditions, such as where it has entered into "arms-length agreements" with its competitors. *Triennial Review Order* ¶ 664. Permitting "state law to determine the validity of the various terms and conditions agreed upon" by BOCs and their wholesale customers "will create a labyrinth of rates, terms and conditions" that "violates Congress's intent in passing the

---

regulation that "consciously has chosen not to mandate" particular action preempts state law that would deprive an industry "of the 'flexibility' given it by [federal law]").

[15] *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947); *United States v. Locke*, 529 U.S. 89, 110 (2000).

Communications Act." *Boomer v. AT&T Corp.*, 309 F.3d 404, 420 (7th Cir. 2002); *see also Triennial Review Order* ¶ 664 (question whether BOC's provision of 271 element satisfies sections 201 and 202 requires "a fact-specific inquiry"). This potential for "patchwork contracts" resulting from "the application of fifty bodies of law" "conflicts with Section 202's prohibition on providing advantages or preferences to customers based on their 'locality.'" *Boomer*, 309 F.3d at 418-19. Section 201, moreover, "demonstrates Congress's intent that *federal law* determine the reasonableness of the terms and conditions" of 271 elements. *Id.* at 420 (emphasis added).[16]

Indeed, state law regulation of 271 elements would be contrary to the Commission's expressed preference for commercial agreements with respect to 271 elements. *See UNE Remand Order* ¶ 473; *Triennial Review Order* ¶ 664.[17] As an initial matter, the possibility of state commission review and potential modification of voluntary commercial agreements will encourage parties to attempt to use the regulatory process to improve further on the terms of a negotiated deal, thus diminishing the parties' ability to lock one another in at the bargaining table. The Commission recognized this in the *Qwest Declaratory Ruling*, explaining that subjecting commercial agreements to the same procedural requirements that Congress specifically applied only to agreements implementing section 251(b) and (c) would raise "unnecessary regulatory impediments to commercial relations between incumbent and

[16] *See also* Order on Reconsideration, *Exclusive Jurisdiction with Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Acto f 1934, as Amended*, 7 FCC Rcd 4123, ¶¶ 14-18 (1992) (preempting state law based, in part, on its finding that rulings "in numerous jurisdictions around the country almost certainly would produce varying and possibly conflicting determinations," thereby "frustrating [Congress's] objectives of certainty and uniformity").

[17] *See also, e.g.*, Press Statement of Chairman Michael K. Powell and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adelstein on Triennial Review Next Steps (Mar. 31, 2004) ("The Communications Act emphasizes the role of commercial negotiations as a tool in shaping a competitive communications marketplace.").

competitive LECs." *Qwest Declaratory Ruling* ¶ 8. In addition, most competitors operate in multiple states and typically seek to negotiate multi-state agreements with incumbents. If the rates, terms, and conditions for provision of 271 elements in such agreements were subject to diverging and potentially conflicting regulation by each state commission, the ability of carriers to reach commercial agreements would also be severely undermined. In this regard, it is noteworthy that numerous competitors in multiple states have obtained access to directory assistance and operator services as 271 elements from Verizon under a standard multi-state contract offer, without any regulation by state commissions. As the Commission recognized, there has been "no adverse effect" on competitors — let alone any "perverse policy impact" — from BOCs provision of these 271 elements without state regulation. *Triennial Review Order* ¶ 661.

CONCLUSION

The Commission should grant BellSouth's petition, issue a declaratory ruling confirming that state commissions have no authority to regulate network elements that BOCs must make available pursuant to 47 U.S.C. § 271 and preempting any contrary state laws.

Respectfully submitted,

Michael E. Glover
Edward Shakin
Julie Chen Clocker
VERIZON
1515 North Courthouse Road
Suite 500
Arlington, VA 22201-2909
(703) 351-3071

Scott H. Angstreich
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, DC 20036
(202) 326-7900

Counsel for Verizon

July 30, 2004

APPENDIX A

THE VERIZON TELEPHONE COMPANIES

The Verizon Telephone Companies are the local exchange carriers affiliated with Verizon Communications Inc. They are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.